

1 Gary W. Rhoades (SBN 166149)
2 LAW OFFICE OF GARY RHOADES
3 834 1/2 S. Mansfield Ave.
4 Los Angeles CA 90036
5 Telephone: (323) 937-7095
6 Facsimile: (775) 640-2274

7 Attorney for Plaintiffs

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **FAIR HOUSING COUNCIL OF SAN**
11 **FERNANDO VALLEY; FAIR**
12 **HOUSING COUNCIL OF SAN**
13 **DIEGO, individually and on behalf of**
14 **the GENERAL PUBLIC,**

15 **Plaintiffs,**

16 **vs.**

17 **ROOMMATES.COM, LLC**

18 **Defendants.**

CASE NO. CV03-9386 PA (RZx)

**SUPPLEMENTAL POST-
HEARING BRIEF BY
PLAINTIFFS FILED
PURSUANT TO COURT
ORDER**

**DATE: September 13, 2004
TIME: 1:30 a.m.
COURTROOM: 15**

Honorable Percy Anderson

19 **I. INTRODUCTION**

20
21 The court has asked the parties for further briefing on two issues. The first issue
22 is whether the Defendant Roommate.com, LLC is liable under Cal. Govt. Code §
23 12955(g), which prohibits aiding, abetting, inciting, compelling, or coercing the making
24 of discriminatory housing statements and other unlawful acts of housing discrimination.
25 Plaintiffs respond that there is evidence of such aiding, abetting, compelling or coercing.
26 With respect to rental housing, the Defendant intentionally puts thousands of persons
27
28

1 through the paces of disclosing and exchanging statements that defendant knows show
2 preferences based on age, sexual orientation, familial status and gender. Defendant also
3 helps many more members make statements showing preferences based on race and
4 religion. Defendant coerces its members to commit these fair housing violations
5 because its unique matching services depends on those unlawful statements.

6 The court has also asked for briefing on the applicability of the Communication
7 Decency Act's § 230(c), which immunizes website companies only when they publish
8 content that is posted by third parties. Plaintiffs respond that the acts of aiding,
9 abetting, inciting, compelling or coercing are acts committed by Roommate.com itself,
10 not third parties. In addition to these strong facts of aiding and abetting (and in some
11 cases coercion), the law §230(c) does not contemplate providing any immunity for any
12 aiding and abetting. Therefore, there is no immunity for Defendant.

13 This brief incorporates the briefs and exhibits previously filed by Plaintiffs in this
14 cross-motion process.

15 16 **II. ARGUMENT**

17 **A. Section 12955(g)**

18 Section 12955(g) states: "It shall be unlawful: . . . For any person to aid,
19 abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful
20 in this section, or to attempt to do so." *Cal. Govt. Code § 12955(g)*.

21 There is no federal equivalent to this claim, and there are very few cases which
22 analyze it. In a recent fair housing case, Inland Mediation Bd. v. City of Pomona, 158
23 F. Supp. 2d 1120 (C.D. Cal., 2001), the court made a brief analysis under the word
24 "incite" and ruled that evidence of a mere attempt of city-sponsored advocacy of fair
25 housing violations raised a triable issue of fact as to the plaintiffs' § 12955(g) claim.
26 Inland at 1151. In a very recent fair employment case, the California Court of Appeal
27 examined a similar aiding and abetting claim in an employment situation. The court
28 overruled the demurrer of a talent agency (that had been sustained by a Los Angeles trial

1 court) thus holding the agency accountable for a network's discriminatory requests and
2 finding that the California Fair Employment and Housing Act should be read liberally.
3 Alch v. Superior Court, 2004 Cal. App. LEXIS 1531 (Cal. Ct. App., 2004). According
4 to the Alch court, because FEHA provides no definition of aiding and abetting, courts
5 have sued the common law definition: "Liability may . . be imposed on one who aids
6 and abets the commission of an intentional tort if the person (a) knows the other's
7 conduct constitutes a breach of duty and gives substantial assistance or encouragement
8 to the other to so act or (b) gives substantial assistance to the other in accomplishing a
9 tortious result and the person's own conduct, separately considered, constitutes a breach
10 of duty to the third person." Id. (emphasis added).

11 For purposes of this brief, the fact that Plaintiffs on November 21, 2004 sent
12 Defendant a comprehensive letter describing the impact of the violations on the
13 communities and the plaintiffs shows that since at least November 21, 2004 defendants
14 have known about the commission of fair housing violations on its website. Defendant
15 admitted to Gary Rhoades in its December 12, 2003 letter that there had been at least
16 one other previous fair housing complaint by other organizations. Rhoades Decl. ¶ 5.

17
18 B. Defendant's Rental Practices Aid, Abet, Incite, Compel or Coerce Many
19 Others to Violate the Fair Housing Laws

20 As shown in previous briefs and the many rental unit profiles submitted by both
21 parties, the most common violations occurring because of Defendant's business practices
22 are discriminatory statements showing preferences based on age, sexual orientation,
23 gender and familial status. Together, §12955(c), §12927 and Cal. Civil Code § 51.2
24 (from the Unruh Act, which adds age as a protected class) make clear that the only
25 situation where a discriminatory preference can be published is in a shared living
26 quarters where the person offering a room for rent can state a preference for gender.

27 The Defendant actually uses the word "preferences" and actually uses the
28 protected classes themselves as preference categories. The discrimination could not

1 be more explicit. For example, the member at Plaintiffs' Exhibit 10A (who calls himself
2 *Archangel777*) is renting out rooms in a four-bedroom, three-bath house. This so-called
3 "member profile"¹ has a section called "Archangel777's Preferences." Three of the six
4 statements under "Archangel777's Preferences" include:

- 5
- 6 1. "Age group: 20-36"
- 7 2. "Gender: Male (straight)"
- 8 3. "Children: No children please."
- 9

10 Thus, anyone under the age of 20 and over the age of 36 is expressly excluded.
11 Any gay or lesbian is excluded. And Roommate.com is not aiding Archangel777 with
12 limiting or inquiring into the number of persons, but rather if one of them is a child. In
13 a large four-bedroom house (that's expanding) there is no exemption nor any practical
14 reason for excluding families with children. Yet, defendant has guided Archangel into
15 making this statement and has refused the plaintiffs' request to do something about such
16 statements. These three statements prompted by the defendant all violate §12955(c)
17 and the §51.2, and because Archangel777 is not exempt (he's renting out more than one
18 room), they also violate §12955(a).

19 The evidence submitted by the parties in the cross-motions show that Defendant
20 Roommate.com LLC has knowingly (knowingly at least since the Plaintiffs' November
21 2003 education letter) put together a three-part services package which aid, abet, incite,
22 compel or coerce its own members into committing such fair housing violations

23 1. Demanding Disclosures Based on Protected Classes

24 The first service which causes fair housing violations is embodied in the *About*
25

26 ¹The vast majority of information in these profiles is about the rental unit and the
27 preferences of the person in control of the unit. There is very little information about the
28 member unless the member discloses a great deal more in the comments section.
Therefore, "member profile" is a misnomer, and one which defendant relies to de-
emphasize the rental aspect of its business.

1 Me page of defendant's website. (citations here or by footnote). Through its *About Me*
2 page, any person who wants to be a member is forced by defendant to disclose their
3 age, sexual orientation, familial status, and gender. (citation) Contrary to defendant's
4 assertions at oral argument, this practice was alleged in the First Amended Complaint
5 (FAC). See FAC ¶ 11.

6 By forcing each person to disclose their protected class, Defendant not only
7 directly violates §12955(c),² but it also accomplishes several things toward aiding and
8 abetting further fair housing violations. First, by demanding this information, Defendant
9 is misleading its California members into believing that these protected classes are fair
10 game in rental housing and thereby is already inciting members to make discriminatory
11 statements and choices.³ Compounding the problem is the fact that Defendant has
12 refused to provide any fair housing information on its website. Plaintiff's Separate
13 Statement of Undisputed Facts ¶ 48.

14 Second, demanding these disclosures provides Defendant with the information
15 it needs to aid the members who have rooms available to rent to make discriminatory
16 statements that violate not only 12955(c) but that also aid members--with the click of
17 their mouse sending preferences to defendant's database--in violating 12955(a) by
18 picking and choosing based on a protected class. This is discussed further under
19 Section II.B.2.

21 ²Housing Rights Center et al v. Donald Sterling 274 F. Supp. 2d 1129 (C.D. Cal.
22 2003)(ruling that inquiries into protected class information violates the fair housing
23 prohibitions against discriminatory statements). As discussed in previous briefing, no third
party is making these inquiries or providing the statements which demand these
disclosures. Therefore, §230(c)(1) is inapplicable.

24 ³Plaintiffs include "choices" here because defendant has members on its website
25 who are not exempt from any state fair housing law. As shown in Exhibit 21 and Bruno
26 Decl. ¶ 19, defendant caters to 'landlords' and very few landlords are exempt under
27 California. In fact, only owner-occupied housing with no more than one room for rent is
28 exempt. (cite) In the very small sampling provided by the parties of rental unit profiles,
there are several where more than one room is being rented including Plaintiffs' Exhibits
10A and the Defendant Exhibit advertising a large Jewish housing "co-op". Therefore,
with respect to aiding and abetting, more than just aiding and abetting violations of
§12955(c) is at issue here.

1 With respect to immunity under § 230(c)(1), the entire disclosure process is
2 implemented and performed by the defendant with no third party involvement (but which
3 quickly aids third parties). Defendant itself has created the statements that demand the
4 disclosures. With no third party involvement, there can be no immunity for this aiding
5 and abetting.

6 7 2. Compelling Members to State Preferences Based on Protected Classes

8 When a member who has a place available to rent attempts to post this rental
9 opportunity on the website, Roommate.com literally says to that member, "Select the
10 criteria by which we should match your potential roommate." Plts. Sep. Statement 12.
11 This statement is found on defendant's "preferences" page. Plaintiffs' Ex. 20. Contrary
12 to defendant's assertions at oral argument, this practice was also alleged in the First
13 Amended Complaint. See FAC ¶12.

14 The preferences criteria are identical to the criteria demanded of the persons
15 looking for a place to rent, and they include age, gender, profession, sexual orientation
16 and the so-called presence of children. Id. Therefore, defendant is aiding, abetting,
17 and inciting members with rooms for rent to make discriminatory statements in violation
18 of §12955(c).

19 For example, if we compare the Defendant's "Preferences" page to the section at
20 Ex. 10A (discussed above) called "Archangel777's Preferences" we can see exactly what
21 happened in the exchange between the defendant and Archangel777:

22 Defendant tells Archangel777 to "Select the criteria by which we should match
23 your potential roommate." Next, the defendant then shows him how to do just that, by
24 guiding Archangel through formatting created by defendant, half of which implicates
25 protected classes. There is not even the slightest hint on this page or anywhere else on
26 the website that fair housing laws might apply. This is a clear case of aiding, abetting
27 and even coercing another person into publishing unlawful discriminatory statements.
28 Archangel777 takes the bait everytime and as shown above he published a rental unit

1 profile for thousands to see that contains three violations.

2 Archangel goes on to state he's looking for a "straight Christian male." This fourth
3 violation is aided and abetted by defendant because Defendant has already made it clear
4 that fair housing law do not apply. As shown in Diana Bruno's Declaration, the
5 Defendant actually published testimonials on its website where past members brag about
6 how they were able to find a Christian renter. Bruno Decl. ¶ 19. Thus, it is easy to see
7 how Archangel777 was given substantial assistance and aided or even compelled to
8 make such statements.

9 With respect to immunity under §230(c), here again the law does not contemplate
10 immunity for a defendant that knowingly aids and abets, much less compels, someone
11 to violate another law. The defendant will no doubt raise the Carafano case (339 F.
12 3rd 1119 (9th Cir. 2003)) case here to say that the Ninth Circuit endorses the immunity
13 of even aiders and abettors. In Carafano, the defendant is a dating service and was not
14 serving persons looking for a place to live or those with a place available to rent. There
15 is no knowledge of a violation, and in fact the matchmaker dating service within one
16 business day had removed the allegedly defamatory statements posted by a third party.
17 Id. at 1123. Though the case involved formatting, the defamatory statements
18 themselves were wholly created by the third party user. Id. In our case, the defendant
19 has created statements such as "sexual orientation is required," "no children please" that
20 are unlawful irrespective of any choice made by a third party, and defendant is itself
21 conducting a questioning and screening process. In other words, as opposed to the
22 defendants in Carafano and other similar formatting case, this defendant knows about
23 the violations and it classifies user characteristics into discrete categories that are
24 themselves already in violation of the state's fair housing laws.

25
26 3. Organizing Information Under Protected Classes and Distributing Matches

27 Roommate.com uses the symmetry between the unlawful demand of disclosures
28 and the unlawful preferences page to create matches based on these categories. As

1 shown by Ex. 23 (*Quick Tour*), Roommate.com emails these matches to both sets of
2 members. It encourages members to prioritize " according to age . ." Sep. Statement of
3 Fact 13. This statement by Defendant is yet another blatant violation of §12955(g),
4 encouraging persons to prioritize based on a protected class.

5 Also, and by way of example, when Archangel777 selected "straight" he not only
6 made a discriminatory statement, he also ensured that that he would be matched only
7 with straight renters. Thus, a gay renter would never have Archangel's advertisement
8 sent to him as a match or via the Defendant's so-called "newsletter." As argued in
9 previous briefs, Defendant as a rental service should have separate liability for such a
10 practice, but it certainly violates §12955(g) with respect to Archangel who has no
11 exemption under the fair housing laws to limit the news of his units to only straight
12 renters (or those without children or those ages 20-36).

13 With respect to immunity under §230(c), Defendant's practice of sending *specific*
14 *and matched* profiles of rental units to persons "looking for a place to live" based on that
15 person's age, sexual orientation, familial status, and gender, is something completely
16 different from publishing third party content. This service, along with the disclosures
17 demands described above, is a service above and beyond even those performed by
18 newspapers such as the one in United States v. Hunter, 459 F. 2d 205, 215 (4th Cir.
19 1972), or by the websites in any of the case cited by defendants in their CDA arguments.

20 This non-publisher service implicates the fair housing laws in two ways: First,
21 defendant is knowingly matching and distributing discriminatory housing statements, and
22 Second, defendant is helping its members limiting the housing opportunities that, say,
23 a 36 year old gay male or a 36 year old single father will receive based on these
24 protected criteria. Third, defendant is compelling persons with a place available to rent
25 to express their preferences based on age, sexual orientation, gender and familial status
26 which is a violation of §3604(c) and 24 C.F.R. §100.75 (both for familial status) and
27 then §12955(c) for the remaining protected classes. Therefore, by definition of the
28 immunity, the CDA's immunity for the unknown (or even known) publication of third

1 party content does not apply when the defendant's aiding and abetting conduct, practice
2 and statements, not third party content, are the issues.

3 4 III. CONCLUSION

5
6 Defendant wants a free pass from the fair housing laws because they aid their
7 members in putting these blatantly discriminatory statements on the internet rather than
8 on lawn signs or in newspapers. However, since they are the largest provider in the
9 country (Def. Sep. Statement ¶ 2) with over 1,000,000 page views per day (Id. ¶ 4) they
10 are actually reaching more people and a more targeted room-seeking audience than a
11 lawn sign service. In other words, the fair housing violations on Roommates.com are
12 doing more damage than a lawn sign. §12955(g) is tailor-made to stop such agencies
13 from assisting or encouraging others to violate the fair housing laws. And §230(c)'s
14 language in no way immunizes such a defendant that is knowingly providing such
15 assistance. For all these reasons, the plaintiffs request that the court enter summary
16 judgment in favor of the plaintiffs on this issue, or in the alternative, rule that a triable
17 issue of fact remains under §12955(g).

18
19 DATED: 9-24-04

20 Respectfully submitted,

21
22 By: Gary W. Rhoades
23 Gary W. Rhoades
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I am over the age of 18 years and am not a party to the within action. My business address
3 is 834 ½ S. Mansfield Ave., Los Angeles CA 90036.

4 On September 24, 2004, and from Kansas City, Missouri,

5 I served a true and correct copy of the following document(s):

6 **Plaintiffs' Supplemental Post Hearing Brief**

7 upon the following person(s):

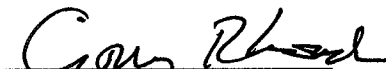
8 Timothy L. Alger, Esq.
9 QUINN EMANUEL URQUHART
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
10 Fax: 213/624-0643

11 in the following manner(s):

| | | |
|----|---|---|
| 12 | | BY HAND DELIVERY: By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above. |
| 13 | X | BY MAIL: By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Kansas City Missouri, addressed as set forth above. |
| 14 | | BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY): By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day. |
| 15 | X | BY FACSIMILE: By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above. |

16
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19
20
21
22 I declare under penalty of perjury that the above is true and correct.

23 Executed on September 24, 2004, at Kansas City, Missouri.

24 
25 Gary Rhoades